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File No. O. Talukdars 47

Legal DEPARTMENT

A BRANCH

Subject:—

Opinions under the Gujarat Talukdar's Act, 1888

B.7/E

# C O N T E N T S.

Legal Department File No. C. Talukdar's/47.


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Office of the R.L.A.

It appears that the Thakore of Metral wants to set apart certain talukadari lands as "jiwai" grants for his brother not only for their lives but permanently with a liability to pay jama in respect of those lands to the Taluka Officer Direct subject to the condition that if and when the male line of their descedants becomes extinct the lands should revert to the Thakore. The question for the consideration of the Remembrancer of Legal Affairs is whether these grants wouldámount to encumbrances within the meaning of sub-section (1) or to alienation under sub-section (2) of section 31 of the Gujarat Talukadar's Act, 1888.

Sub-section (1) of section 31 of the Gujrat Talukdars' Act, 1888, bars encumbrances created on a talukdar's estate beyond the talukdar's own life except with the previous sanction of the Provincial Government which sanction shall not be given except upon the condition that the entire responsibility for the portion of the Jama and of the village expenses and police-charges due in respect of the alienated area shall thenceforward vest in the alienee and not in the talukdar. "Alienation" as defined in clause (d) of section 2(1) means a transfer of ownership, and "alienee" means person to whom ownership is transferred; and "encumbrance" as defined in clause (e) includes a mortgage charge usufructuary grant and any interest other than that of an ordinary tenant or an alienee or talukdar and "incumbrancer" means a person in whom an incumbrance vests. "The owner of a material object is he who owns a right to the aggregate of its uses. He who has merely a special and definitely limited right to the use of it such as right of way or other sevitude, is not the owner of the thing but merely an encumbrancer of it. The definition however must not be misunderstood. Ownership is the right of a general use, not that of absolute or unlimited use. He is the owner of a thing who is entitled to all those uses of it

which are not specially excepted and cut off by the law. No such right as that of absolute and unlimited use is known to the ~~the~~ law. All lawful use is either general (that is to say, residuary) or specific, the former being ownership, and the latter encumbrance" (see Salmond on Jurisprudence page 446). Under the proposed grants the Thakore's brothers and their lineal male descedants would be entitled to all lawful use of lands and consequently these grants would amount to a transfer of ownership, that is to say, allienations within the meaning of clause (d) of section 2(1) of the Bombay Talukdar's Act, 1888 (See R.L.A.'s opinion No. Talukdar-2, dated 22-10-1928). The view taken by Revenue Department at page 7 ante is correct.

~~O.C.~~

Sd/-. D.V.Vyas .

Remembrancer of Legal Affairs.

U.R., to R.D. No. 833, dated the 23rd January 1947.

JPE 7/5/56.
4c.

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It appears that the Bhankoda Estate is held by co-sharers in a family undivided according to Hindu Law or otherwise. If so, it would be competent with the sanction of Government for the Taluqdari Settlement Officer or any other officer appointed by Government to take the estate under his management on an application signed by co-sharers holding an aggregate interest of not less than three-fouths of the whole estate (See section 28(2) of the Gujrat Taluqdar's Act, 1888). Since co-shrers holding such aggregate interest are willing to make an application for the purpose there would be no difficulty for Government to sanction the assumption of management of the estate by the Taluqdari Settlement Officer. But the main difficulty appears to be in the actual assumption of management of the estate since Mr. Ginwalla is already managing the estate as Court Receiver. It is true that a Court Receiver is an officer of the Court and his possesion cannot be disturbed except by due process of law; but the court which appointed Mr. Ginwalla as receiver has also power to remove him. Consequently, on a sanction being given by Government for assuming the management of the estate in the present case the officer concerned should not proceed to evict Mr. Ginwalla but should apply to the Court to cancel the appointment of Mr. Ginawalla as Receiver; and the circumstances of the case are such that in all probability the Court will grant the application.

~~O.C.~~

Id/- D.V.Vyas.

Remembrancer of Legal Affairs.

U.R. to R.D. No. 8114, dated the 7th August 1947.

JPE 7/5/56
4c.

Office of the R.L.A.

Sale of property of the Thakor of Jorapur.

Broach and Kaira Incumbered Estates Act, 1881 and Bombay co-operative societies Act, 1925, and Gujrat Talukdars Act, 1887

It appears that in 1938, the Thakor of Jorapur with the sanction of the Commissioner N.D. Under section 28 of the Broach and Kaira Incumbered Estates Act, 1881, raised on the security of his property a loan of Rs.10,000/- from Kaira District Co-operative Land Mortgage Bank on condition of repayment in yealy instalments of Rs.871 each. He made default in payment of instalments whereupon the Bank obtained an award for the recovery of its dues and applied for its execution through the Collector under section 59(1) of the Bombay Co-operative Societies Act, 1925, as an arrear of land revenue. The mortgaged property was put to sale and the Collector confirmed the sale on 17-1-1945 but on appeal the Commissioner set aside the sale on the ground that his sanction was not obtained for sale under section 28 of the Broach and Kaira Incumbered Estates Act. The Bank has now appealed to Government to rescind the order of the Commissioner. The question raised for the consideration of the R.L.A. is whether the order of the Commissioner cancelling the sale was legally competent.

Section 28 of the Broach and Kaira Incumbered Estates Act, 1881, provides:-

> "When a Thakor has been restored under section 26 to the possession of any property, no mortgage incharge, lease or alienation of such property by such Thakor, shall be valid as to any time beyond his natural life unless made or granted with the previous sanction of the Commissioner."

In Vagrishankar Bhaishankar v. Madhavsanji (27 Bom. L.R. 83) it was held that the disability contained in section 28 of the Broach and Kaira Incumbered Estates Act, 1881, applies not only to the Thakor during whose life-time the estate was taken under management under the Act, but to his successor also. It appears that it was in view of this disability that the sanction of the Commissioner for raising the loan under section 28 was applied for and obtained by the Thakor. In enforcement of the mortgage loan

raised by the Thakor with the sanction of the Commissioner under section 28 and award was obtained and in execution of that award the mortgage property of Thakor was put to sale. It is therefore evident that the loan being obtained with the sanction of the Commisioner under section 28, the sale for recovery of that loan would be merely consequential and no fresh sanctioned for the sale would be necessary. Further section 28 prohibits alienation of property by a Thakor except with the previous sanction of the Commissioner. A sale in execution of an award would not be a sale by a Thakor within meaning of section 28. In other words section 28 prohibits voluntery alienation and not involuntary alienation such as sales through Court or by the Collector in exercise of powers under the Bombay Land Revenue Code, 1873. Consequently, the sale which was effected in the present case through the Collector in execution of the award, not being a voluntary alienation, would in no way be vitiated for want of sanction of the Commissioner. The order of the Commissioner setting aside the sale was therefore incompetent and ultra vires.

Section 31 of the Gujrat Talukdars Act, 1888 prohibits incumbering of any taluqdari estate or alienation thereof except with the sanction of certain authorities. Section 32(2) provides that nothing in the last preceding section shall apply to property of any Thakor to which section 28 of the Broach and Kaira Incumbered Estates Act, 1881, is applicable or be deemed to affect the power of the manager of any Thakor's immovable property under section 24 of the said Act. As stated above, the Thakor in the present case obtained the sanction of the Commissioner under section 28 of the Broach and Kaira Incumbered Estates Act, 1881, for mortgaging his property. Consequently, section 31 of the Gujrat Talukdars Act, will have no application to the present case.

~~O.C.~~

p.M.L.

Id/- ~~R.A.L.~~

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Remembrancer of Legal Affairs.

U.R. to R.D. No. 9460, dated the 24th September 1947.

JPE. 7/5/56. 4c.

Office of the R.L.A.

Levy of Cess etc.

Bombay Tenancy Act, 1939,
Bombay Haq Prohibition Act. 1839.

The legal position in para.1 of the draft press note at p.41 ante as slightly amended in pencil is in order.

With regard to para. 2 the view expressed by Secretary Revenue Department, in the margin is correct. A separate order under section 1 of the Bombay Haqs Prohibition Act, 1839, should in the first instance be issued, if necessary after consulting the Commissioner, N.D. and then a press note clarifying the position may be issued; but as H.M. desired, in the meantime, attention may be drawn to the enactments in general terms with a view to emphasize the illegality of the exactions.

O.C.

Id/- R.M.L.
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Remembrancer of Legal Affairs.

U.R. to R.D. No. 9742, dated the 6th October 1947.

JPE. 7/5/56.
4c.